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No. 87-326

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

G.D. SEARLE & CO.,
Petitioner,
v.
DEBRA A. AND GEORGE SIMON, *et al.*,
Respondents.

On Petition For a Writ of Certiorari to the United States Court of Appeals For the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITIONER

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITIONER

The Chamber of Commerce of the United States hereby moves for leave to file the attached brief *amicus curiae* in support of the petition for certiorari in this case pursuant to Supreme Court Rule 36.1. This motion is necessary because counsel for the respondents refused to consent to the filing of the brief. Counsel for the petitioner, G.D. Searle & Co., has consented to the filing.[1]

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[1] A copy of the petitioner's consent letter is being filed simultaneously with the attached brief.

This case arose out of a series of product liability actions related to a contraceptive device manufactured by the petitioner, G.D. Searle & Co. ("Searle"). The issues presented involve the discoverability of documents reflecting counsel's confidential estimate of the settlement value of claims pending against a corporate defendant and the amount of cash reserves required to satisfy such claims. The Eighth Circuit's holding that such documents are not protected from discovery under the work product doctrine or the attorney-client privilege will adversely affect the ability of corporate defendants effectively to defend and settle such cases in the future.

The Chamber of Commerce of the United States ("Chamber") is the nation's largest federation of businesses, representing more than 180,000 companies as well as several thousand trade and professional associations and state and local chambers of commerce. The Chamber regularly presents its views before this Court and the lower federal courts.[2] The Chamber's membership includes many businesses which, due to the nature of the products they manufacture, are occasionally the object of mass product liability litigation. The Chamber has surveyed many of these members—including members of the chemical, pharmaceutical and materials industries—and determined that the procedures followed by Searle to assess its potential liability and accrue a reserve of funds to satisfy pending claims are similar to those used in most of the major industries in the United States. The Court's ruling in this case thus will have a substantial effect on American business.

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[2] *See, e.g., Boyle v. United Technologies Corp.*, 792 F.2d 413 (4th Cir. 1986), *cert. granted*, 107 S. Ct. 872 (1987); *Tull v. United States*, 107 S. Ct. 1831 (1987); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985); *Bowen v. United States Postal Service*, 459 U.S. 212 (1983); *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).

If the ruling of the Eighth Circuit is not reversed, it will seriously diminish the ability of a corporation to obtain the advice of legal counsel to assess potential liabilities when faced with such claims, and to set aside funds to satisfy and defend such claims. In so doing, it will frustrate the ability of corporations to comply with accounting and accrual practices that benefit not only the corporation and its stockholders, but the general public as well as plaintiffs who bring such claims. Moreover, the disclosure of this information in mass tort litigation will inhibit the settlement of such cases and improperly encourage the filing of unmeritorious and frivolous claims.

As the principal voice of the American business community, the Chamber is well-suited to represent its interests in this case. Because the Chamber believes it is important for this Court to recognize the significance of this issue to the business community in general, the Chamber respectfully requests leave to file the attached brief.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITIONER

STATEMENT OF INTEREST

The Chamber of Commerce of the United States ("Chamber") respectfully refers this Court to the attached Motion for Leave to File Brief Amicus Curiae for a statement of the Chamber's interest in this proceeding.

STATEMENT OF THE CASE

This case arises out of a series of product liability actions related to a contraceptive device manufactured by petitioner, G.D. Searle & Co. ("Searle"). Forty-nine of these cases were consolidated for discovery in the United States District Court for the District of Minnesota before the Honorable Miles W. Lord. In response to the

court's sweeping order to produce "each and every document contained in its files" relating to the device, Searle produced over 500,000 documents. *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 399 (8th Cir. 1987). The company resisted discovery, however, of certain documents prepared by Searle's risk management department "to keep track of, control, and anticipate the costs of Searle's product liability litigation." *Id.* at 400. Many of these documents included product liability litigation reserve information that was based on reserve estimates prepared by and obtained directly from the attorneys in Searle's legal department.

Whenever Searle is notified of a claim or lawsuit against it, the company requests one of its attorneys to analyze the matter and advise the company of an appropriate amount to set in reserve. The attorney sets the reserve on the basis of numerous factors, including his estimate of the company's liability (if any), anticipated legal expenses required to defend the matter, and the length of time required to resolve the action. The attorney then communicates these estimates to the risk management department.

Information regarding case reserves is regarded as confidential information within the company, and is available only to the attorneys and risk management personnel with a specific "need to know" the amount of the reserves. The information is not released outside the company at all, except to outside legal counsel, who need the information to defend the claims and negotiate settlements, and to insurers, who must be prepared to participate in paying these claims.

Following *in camera* review of these documents by a special master, the court permitted Searle to withhold from discovery only those which revealed a " 'specific litigation strategy or mental impressions of attorneys in evaluating cases, or setting a reserve for a specific case' ". *Id.* at 399 (citation omitted). Documents revealing "ag-

gregate reserve information not identified with individual cases" were ordered to be disclosed. *Id.*

Searle was granted permission under 28 U.S.C. § 1292(b) (1982 & Supp. III 1985) to take an immediate appeal from this interlocutory order. In a split decision, the United States Court of Appeals for the Eighth Circuit found that documents revealing aggregate case reserves were not protected from discovery under the work product doctrine or the attorney-client privilege. By a vote of five-to-five, a petition for rehearing *en banc* was denied.

REASONS FOR GRANTING THE WRIT

I. THE EIGHTH CIRCUIT'S UNPRECEDENTED RULING WILL HAVE A SWEEPING EFFECT ON BROAD SEGMENTS OF AMERICAN BUSINESS

The Eighth Circuit's decision allows mass product liability plaintiffs access to documents reflecting counsel's confidential estimates of the total settlement value of pending claims against a corporate defendant and the amount of cash reserves required to satisfy such claims. Because this is the first such ruling in the history of American jurisprudence, it should be examined by the Court. If the ruling is not reversed, it will have a sweeping effect on product liability cases affecting major industries throughout the country. Disclosure of this information will adversely affect the ability of corporate defendants to consult with their attorneys to organize and manage such cases, to defend and settle such cases effectively and, ultimately, to satisfy claims brought against them.

A. The Claim Evaluation Procedures Followed By Searle Are Typical of Those Used In the Major Industries Subject to Mass Product Liability Litigation And Require the Advice of An Attorney

The procedures followed by Searle are not unique. The Chamber has surveyed from among its member com-

panies whose industries are known to be subject to mass product liability litigation. These include manufacturers of chemicals, pharmaceuticals, industrial materials and consumer products.[1] The Chamber has confirmed that most businesses faced with mass product liability claims customarily set in place procedures that are similar, if not identical, to those adopted by Searle.

Notice of a claim or a lawsuit against a company in these industries generally is forwarded by the company to an attorney in the company's legal department. It is the specific responsibility of the attorney to evaluate the claim and to determine the company's potential liability. This task is a uniquely legal one which, though it may at times require input and assistance from scientific, accounting, and clerical personnel, must be performed by an attorney. The attorney's evaluation includes analysis of the legal theories of liability asserted against the company, a similar examination of available defenses, a weighing of the evidence supporting these claims and defenses, an assessment of the skill of the attorneys presenting (and defending) a claim, and a knowledge of the predilections of courts and juries.

Claim evaluations are communicated by the attorney to the company, which must decide whether to pay or defend the claim. Where claims are numerous, and where the decision is to defend them, the organization and administration of a defense effort may be quite complex. Such efforts typically result in the generation of numerous documents. Some of these documents (such as invoices and receipts) may contain no information relating to the substance of a claim or its defense. Others (such

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[1] *See* Rubin, *Mass Torts and Litigation Disasters*, 20 Ga. L. Rev. 429, 430-431 (1986). (Asbestos litigation: 30,000 suits filed; Dalkon Shield litigation: 13,000 suits filed; Agent Orange litigation: class action suit filed by class estimated to include between 600,000 and 2.4 million members.)

as memoranda containing instructions to legal, administrative, or accounting personnel) may reflect communications to and from, or the mental impressions of the corporation's attorneys. All such documents, whether they relay sensitive information or not, are prepared in anticipation of, and in the course of, defending the claims.

Establishment of a "case reserve" is one administrative aspect of the management of a defense effort. Case reserves may be established directly by the attorneys who evaluate the claims, or by accounting (or as in this case "risk management") personnel who operate on the advice of the company's attorneys. The case reserve is used by the company as a planning tool in paying for the defense, settlement and payment of claims.

Where numerous like claims have been brought against a company, it is not unusual for case reserves to be recorded in the aggregate. Whether recorded individually or in the aggregate, however, the reserve figure reflects the confidential estimate of the company's attorney as to the amount required to defend or satisfy the claim.

B. The Practice of Establishing Case Reserves Is Beneficial to the Public Interest

The practice of establishing case reserves has a number of salutory purposes above and beyond its function in the administration of a product liability defense. Many of these purposes, e.g., sound financial planning, serve the private interests of the corporation and its stockholders. The corporate stability that is encouraged by such planning, however, serves a variety of interests that are decidedly public. It allows industrial corporations to continue to serve as a source of employment and critical manufactured goods even as claims against them are litigated. It also permits a favorable environment for commerce and investment to continue to exist in the

presence of claims of a magnitude that, if not properly planned for, could result in massive bankruptcies and related foreclosures.[2]

Ironically, the most direct beneficiaries of the practice of establishing case reserves may be the plaintiffs who bring mass product liability actions. If corporate defendants did not evaluate claims in this systematic fashion and establish and accrue appropriate case reserves, they could not hope to satisfy such claims. Without the benefit of this practice, successful plaintiffs likely could enjoy only pyrrhic victories. Rather than cash payments, most plaintiffs would receive unenforceable judgments against bankrupt corporations as the only vindication for their injuries.

C. Disclosure of Aggregate Case Reserves Will Frustrate A Corporate Defendant's Ability to Obtain Legal Advice

Disclosure of a corporate defendant's aggregate case reserves in mass product liability litigation will frustrate several public policy objectives traditionally favored under the law. Disclosure will inhibit the communication between a corporate defendant and its counsel that is necessary for a corporation to obtain sound legal advice in evaluating its potential liabilities. If it is to become the rule that case reserves are discoverable, then prudent litigation counsel, with a view toward settlement discussions, will keep a wide distance between the liability evaluations he provides to his client and any case reserves the company subsequently may establish. Corporate defendants, moreover, would be unwise (from a litigation perspective) to allow their case reserves to resemble any figures that purport to represent

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[2] These public interests are embodied in the accounting principles that require accrual and disclosure of certain loss contingencies relating to pending or threatened litigation, *see, e.g.*, FASB Statement of Financial Accounting Standards No. 5. *See also* 17 C.F.R. pt. 210 (1987).

a studied evaluation of their potential liabilities by their attorneys.

Corporate defendants of course have a business need for reliable legal advice, including evaluations from their attorneys of their potential liabilities in cases brought against them. But the law traditionally has not penalized businesses that rely on such advice by making it disclosable to their opponents in litigation. If Searle is to be so penalized in this case, then similarly situated defendants in the future will find ways to set case reserves without jeopardizing the confidentiality of their attorneys' assessment. *Cf. Hickman v. Taylor*, 329 U.S. 495, 511 (1947). ("Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. . . . Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect in the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.")

Corporate defendants who are deprived of frank and thorough legal assessments of their potential liabilities obviously would be handicapped. The public interests served by responsible establishment of accurate litigation reserves, *see supra* at 5-6, thus would suffer and, in the end, the very ability of plaintiffs to obtain recovery for their injuries will be diminished.

D. Disclosure of Aggregate Case Reserves Will Discourage Settlements In Mass Product Liability Matters

Disclosure of aggregate reserves also will frustrate the settlement process in mass tort litigation. As Judge Gibson noted in his dissent below, settlements in such cases frequently are negotiated on a global basis. The unilateral armament of one party to a settlement negotiation with his adversary's assessment of the potential

aggregate liability is unfair. *Simon v. G.D. Searle & Co.*, 816 F.2d at 408 (Gibson, J., dissenting). Moreover, it unfairly erodes the attorney-client privilege of corporate defendants whose in-house counsel participate in claim analysis and litigation strategizing, while preserving the privilege when the same analyses are undertaken by outside counsel on the plaintiff's behalf.

The harm to the settlement process, however, extends beyond this, because disclosure of aggregate case reserves will frustrate settlements in individual cases as well. At this level, the use of such information is particularly unfair. As the majority observed, it is misleading to attempt to compute averages from the aggregate case reserves, "given the possibility of large variations in case estimates for everything from frivolous suits to those with the most serious injuries." *Id.* at 402. It is naive for that court to pretend, however, that the plaintiffs' bar will not misuse the aggregate reserves for this purpose, distilling them into averages, and mistreating these figures as concessions of liability for negotiating purposes with respect to individual claims. The denomination of such figures as "averages" will become a self-fulfilling prophecy. Attorneys who entice clients to litigate will be hard-pressed to explain to any client why he should settle for less than the "average" case reserve. Moreover, the "averages" assuredly will escalate as they become a "floor" for subsequent negotiations in similar cases.

E. Disclosure of Aggregate Case Reserves Will Encourage Litigious Plaintiffs to File Frivolous Claims

Finally, disclosure of aggregate reserves will further encourage the explosion in mass product liability cases that already has swollen the dockets of the district courts. The Court is well aware of the vast numbers of product liability cases brought each year and the various information-sharing techniques employed by the plaintiffs' bar

in litigating and soliciting such cases. *See supra* at 4, n.1. Forced disclosure of funds accrued by corporations to satisfy product liability claims cannot help but inspire those with marginal and frivolous claims to join in the action and to seek "their" share of the aggregate case reserves that appear to await them like a pot of gold at the end of the rainbow.

II. CONCLUSION

For these reasons stated above, the Court should grant the petition for certiorari.

Respectfully submitted,

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